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No. 87-1830

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

LARRY BLALOCK,

Petitioner,

-v-

METALS TRADES, INC.,

Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

		PAGE
I.	INTRODUCTION	1
II.	ARGUMENT	3
	THE LOWER COURT ERRED IN NOT REQUIRING RESPONDENT TO PRESENT OBJECTIVE EVIDENCE THAT IT WOULD HAVE DISCHARGED PETITIONER FOR A LEGITIMATE REASON.	
III.	CONCLUSION	9
IV.	CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

PAGE

Price Waterhouse v. Hopkins, Case No. 87-1167 passim

SUPPLEMENTAL BRIEF TO PETITION FOR CERTIORARI

I. INTRODUCTION

Petitioner Larry Blalock is filing this Supplemental Brief, pursuant to Sup.Ct.R. 22.6, to address the impact of the recent decision of this Court in Price Waterhouse v. Hopkins, Case No. 87-1167, on the issues presented in the instant petition for certiorari.

The case at bar, like the Price Waterhouse, supra, case is one involving mixed motivation. As the lower courts in the instant case found, the petitioner proved through direct evidence that he was discharged because of his religion. Utilizing the shifting burden approach, the trial court held that the respondent proved that the petitioner would nevertheless have been fired for

legitimate reasons, although respondent presented no objective evidence that it would have discharged petitioner in the absence of discrimination. Instead, the trial court based its decision on the mere bald statement of respondent's president at trial that respondent did not discriminate against the petitioner.

Petitioner is requesting that this Court grant certiorari so that it can issue a definitive ruling on the employer's burden in mixed motivation cases in which a plaintiff proves discrimination through direct evidence or, in the alternative, remand the case for reconsideration in light of this Court's decision in Price Waterhouse, supra.

II. ARGUMENT

THE LOWER COURT ERRED IN NOT REQUIRING RESPONDENT TO PRESENT OBJECTIVE EVIDENCE THAT IT WOULD HAVE DISCHARGED PETITIONER FOR A LEGITIMATE REASON.

This Court held in Price Waterhouse, supra, that in mixed motivation cases if a plaintiff proves that an impermissible factor played a motivating (or substantial) part in an adverse employment decision, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision at the moment the decision was made solely because of legitimate reasons. The plurality of this Court stated in Price Waterhouse, supra, that after plaintiff proved that an impermissible factor was involved in the decision, the employer had to "present some objective evidence as to its probable

decision in the absence of an impermissible motive." Id., slip op. at 21. The plurality rejected "Justice White's suggestion, post at 3, that the employer's own testimony as to the probable decision in the absence of discrimination is due special credence where the court has, contrary to the employer's testimony, found that an illegitimate factor played a part in the decision...." Id., slip op., at 21, n.14. Justice O'Connor supported the plurality's statement of the defendant's burden by emphasizing in her concurring opinion the difficulty of defendant's burden and by asserting that employers should not be relieved of responsibility by merely articulating at trial a legitimate basis for its decision. See O'Connor, J., concurring, slip op., at 13.

The trial court in the case at bar concluded that there was uncontradicted direct evidence that the petitioner was discharged because of a falling out with the religious leader of the president of the respondent company.

Wendell Woodward, president of respondent, admitted at trial that he told the petitioner at the time of the discharge that he was laid off until he got things resolved with Mr. Woodward's religious leader. The uncontradicted evidence was that Mr. Woodward later told the petitioner that he would consider rehiring him if he would talk about religious matters.

The trial court, without, of course, the assistance of this Court's opinion in Price Waterhouse, supra, then concluded that the employer had shown that the

petitioner would have been discharged in the absence of discrimination for legitimate reasons. There was no objective evidence to support the trial court decision.

Despite the direct evidence of the motivation for the decision to discharge at the moment it occurred, the trial court accepted Mr. Woodward's "testimony that he made the decision to discharge Blalock for strictly secular or work related problems." See Cert.Pet., at 21a, 32a. The trial court concluded that a legitimate basis existed for petitioner's discharge based only upon Mr. Woodward's unsupported statement at trial denying that he discriminated and his ex post facto testimony that he had previously had problems with the petitioner's work performance.

The trial court placed undue special credence on Mr. Woodward's self-serving statement that the discharge was based entirely on permissible motives even after the trial court and the Court of Appeals had held that the decision was based at least in part on discriminatory motives. This is a classic example of the type of evidence that the plurality of this Court in Price Waterhouse stated was insufficient to overcome the plaintiff's direct evidence of discrimination. Id., slip op., at 21, n.14. Mr. Woodward's statement of non-discrimination also constituted a mere articulation by the respondent of a legitimate basis for the discharge, that Justice O'Connor stated was insufficient to overcome direct evidence of discrimination. See O'Connor, J., concurring, slip op., at 13.

Objective evidence that should be required in mixed motive direct evidence cases, and that did not exist in the case at bar, is evidence that cannot be manufactured by a respondent in preparation for trial. Such objective evidence might include the employer's telling the employee that he might be fired because of bad work performance, a warning of poor job performance, prior discipline or telling the employee at the time of the discharge the reasons for the discharge. The respondent in the case at bar did not warn the petitioner of poor job performance, did not give him or anyone else the reason for the termination, and did not document the reasons for the discharge or dissatisfaction with job performance. Furthermore, the respondent told the

petitioner that he was satisfied with his job performance. See, Cert.Pet., at 40a.

At a minimum, a respondent who attempts to show objective evidence of a legitimate basis for the discharge must provide the discharged employee with a non-discriminatory reason for the discharge. Respondent in the case at bar did not do so. Instead, the respondent told the petitioner that he was being fired because of his religious beliefs and that he would not talk with him about his work performance. All the objective evidence negates Mr. Woodward's statement at trial that he discharged the petitioner for strictly secular reasons.

III. CONCLUSION

This Court should grant certiorari so that the Court can rule definitively that objective evidence is required for an

employer to rebut direct evidence of discrimination and to reject the inference made by the dissent in Price Waterhouse, supra, to the contrary. See, Kennedy, J., dissenting, slip op., at 2. If objective evidence were not necessary and if the employer could be relieved of responsibility by merely testifying that he/she did not discriminate, the shifting burden standard of Price Waterhouse would be gutted. An articulation of a legitimate basis for the decision would replace a requirement of proof. If objective evidence were not required, the burden of employers in direct evidence cases would be much less than that of employers in cases in which employees have established a prima facie case of disparate impact and in which employers must present evidence of business

necessity. It would be much easier for the most overt racists, sexists, and religious bigots to be relieved of responsibility for their actions than for those who did not have discriminatory motives. For instance, an employer who did not want to hire or promote blacks or women would be exonerated if he/she could fabricate for trial a credible story about the candidate's lack of qualifications.

In the alternative, this Court should remand this case for reconsideration in light of Price Waterhouse to allow the lower courts the opportunity to interpret Price Waterhouse and to adjudicate whether the respondent in this case has presented the type of proof required by Price Waterhouse.

Respectfully submitted,

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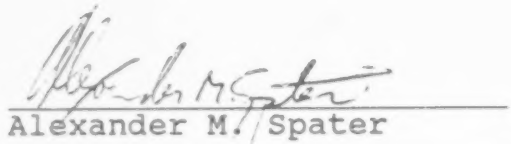
IV. CERTIFICATE OF SERVICE

I hereby certify that three copies by regular U.S. Mail have been served upon Lloyd C. Nicol, 5712 Satinwood Drive, Columbus, Ohio 43229 this 8th day of May, 1989.



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